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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of NOEL LEE and LILY LEE.	
NOEL LEE, Appellant, v. LILY LEE, Respondent.	A149760 (San Mateo County Super. Ct. No. FAM0132617)

Noel Lee challenges an order requiring him to pay temporary spousal support and interim attorney fees and costs. He claims the trial court erred in ordering temporary support and interim fees because the parties' premarital agreement precludes such an award, and the court should have ruled on the enforceability of that agreement before making any support and fee order. We conclude, given the specific record before us, the court did not err in ordering temporary support and interim fees pending bifurcated trial on the enforceability of the parties' premarital agreement.

BACKGROUND

Noel and Lily Lee[1] were both previously married. Each had children from their prior marriages, as well as substantial assets. The couple met in 1995 and married in Texas in 1999.

Ten days before their wedding, Noel and Lily executed a premarital agreement.

Paragraph 9.5 of the agreement provides: "Neither party is entering into the marriage to obtain spousal maintenance of any kind in the event of a legal separation or dissolution proceedings. Each party waives any right that may exist under law to seek or obtain spousal maintenance or alimony from the other party. If a court of competent jurisdiction orders either party to pay to the other party, or to a third party on behalf of the other party, temporary spousal support or alimony of any kind during the pendency of a legal separation or dissolution proceeding, that temporary spousal support or alimony must be reimbursed to the party paying the spousal support or alimony within five days after receipt by the receiving party. Thus, for example, if $1,000 in temporary alimony is paid by Noel Lee to Lily Gao during the pendency of a legal separation or dissolution proceeding, the sum of $1,000 must be reimbursed to Noel Lee by Lily Gao within five days after Lily Gao receives the $1,000 from Noel Lee."

Paragraph 9.8 provides: "During the pendency of any legal separation or dissolution proceeding, neither party may be required to pay interim attorney's fees, costs, or other expenses to the other party or the other party's attorney. Each party must pay his or her own attorney's fees, costs, and other expenses on final hearing of any legal separation or dissolution proceeding."

Paragraph 15.5 of the agreement provides: "Texas law or United States law, as applicable, governs the construction and enforcement of this agreement to the maximum extent permitted by law."[2]

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[1] We use the parties' first names for the sake of clarity. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475–176, fn. 1.)

[2] Texas and California have adopted similar versions of the Uniform Premarital Agreement Act. (Compare Tex. Fam. Code, § 4.006 and Fam. Code, § 1615.)

Both parties initialed the bottom of every page of the 31-page agreement, both parties signed the agreement, and their signatures were notarized.[3]

The couple separated on April 11, 2016.

The following day, Lily filed a petition for dissolution of marriage in San Mateo, California and asked the court to set aside the premarital agreement.

Three days later, she filed a request for temporary spousal support and interim attorney fees and costs. She requested $25,000 a month in support and $200,000 in attorney fees and costs.

In response, Noel asked the court to enforce the terms of the premarital agreement and to deny Lily's requests. Shortly thereafter, he asked that the court bifurcate the issue of the validity of the premarital agreement "from all other issues in this proceeding," and that the court "set an early and separate trial" on that issue. This request, along with a request to limit discovery, was ultimately granted on October 17, and the court set the matter for a nine-day trial beginning on June 19, 2017.

In the meantime, in her memorandum of points and authorities in support of her request for temporary spousal support and interim fees and costs, Lily asserted the premarital agreement was void and unenforceable, and asked the court, pursuant to Family Code sections 3600 and 4320, to order support "during the pendency of the dissolution to preserve the marital standard of living to which she became accustomed during the parties' marriage." In her reply declaration, Lily claimed she signed the premarital agreement after the marriage ceremony and was unaware of what she was signing. Lily immigrated to the United States in 1992. Her native language is Haugar, but she also speaks Cantonese and, according to Lily, "limited English."

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[3] Lily also agreed: "I AM ENTERING INTO THIS AGREEMENT VOLUNTARILY AFTER RECEIVING THE ADVICE OF INDEPENDENT COUNSEL." She further acknowledged, immediately above her signature, that: "[T]he English language is not my native language and that I have received sufficient assistance in understanding all of the provisions contained herein."

In a 1999 financial statement attached to the premarital agreement, Noel reported having an estimated net worth of $53 million in real estate holdings and other assets, including his company, Monster Cable Products, and its affiliates and subsidiaries (Monster Entities), which he founded and owned. In his income and expense declaration filed in September 2016, Noel reported assets worth over $110 million, which included stocks, bonds and other assets. He reported a monthly income from Monster of about $83,000, but claimed the company had significant losses in 2013 and 2014, most of which he covered with his own resources, and he estimated the company's present value "to be zero."

Lily, in turn, initially reported assets worth about $8.8 million, which included stocks, bonds and assets she could "easily sell" of $846,912 and cash and bank accounts totaling $515,581. A month later, just prior to the hearing on her request for temporary support, she filed another income and expense declaration showing only $87,000 in cash and bank accounts.

At the hearing on temporary support, the court, commenting on the already sizeable court file, observed the dissolution proceeding was "becoming very litigious very early on." It stated it had looked at both parties' expense and income declarations, the Monster Entities earning statements, and the record of unemployment benefits Lily had received following her departure from Monster.

The court found Noel had monthly wages of $88,769, the property taxes on the parties' home were $4,289 per month, and Lily had no income as of the time of the hearing "other than rental property income" of $10,000 per month. The court then stated, "based upon the court's findings, the guideline support is $29,117 per month. And that is prospective from October 1st, 2016. The temporary spousal support is effective at the date of the filing of the request for the order. And based upon the income that [Lily]

received for unemployment, that spousal support is $28,621 per month. And arrearages of one and a half months of temporary spousal support totaling $42,931.50."[4]

Counsel for Noel then inquired about the effect of the marital agreement. The court stated, "I'm aware that there is a prenuptial agreement, but the matter is being litigated. It's not quite clear as to its efficacy or the provisions. And this is something that should probably try—be tried in a short cause action. And anything that is committed to could be recouped or ultimately this is a temporary spousal support issue and it may be waived, but there is not a provision for us right now to be able to try this issue today." Counsel then asserted Texas law should apply, the parties had stipulated to bifurcation so the validity of the agreement could be determined promptly, and the court "in the interim" should not award any support. Counsel also questioned the disparity between Lily's August 2016 income and expenses declaration, which listed $518,581 in cash and checking accounts, and her September declaration, which listed only $87,000, and asserted she had, in any case, sufficient assets to support herself.

Counsel for Lily responded, "the courts are abundantly clear that pendente lite spousal support should be ordered pending a decision on the merits of the case. . . . Because temporary support is to maintain the status quo." Counsel blamed the discrepancy between the August and September income and expense declarations on Lily's asserted lack of proficiency in English, and stated she had since retained a Cantonese interpreter and believed the amended declaration was "completely accurate." Counsel then pointed out asserted discrepancies in Noel's declaration.

At this point, the court stated "temporary spousal support is utilized and maintained [to keep] living conditions and standards of the parties [] as close to the status quo position. [*sic*] That's possible pending the division of assets. And in the case of prenuptial agreements, the determination of the agreements."

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[4] The amount of support awarded was over $4,000 a month more than Lily had requested. However, Noel makes no challenge on appeal to the amount of temporary spousal support awarded.

The court then summed up the parties' contentions as to their premarital agreement: Lily maintains she "didn't really have a full understanding of the agreement at the time it was executed," while Noel claims Lily "knew or should have known that she was foreclosed from any temporary spousal support or attorney's fees by virtue of Texas Law and the provision that she signed." But "those things notwithstanding, they haven't been adjudicated. They are issues that are contested. And by the way, we're in California. Full faith and credit can be given to this document, but the court is reserving jurisdiction on the support pending the outcome of the resolution of the prenuptial agreement. [¶] And as such, there could be a clawback. There is a clawback provision within the prenuptial agreement assuming that it controls in the end. And the court hasn't decided that yet. But in the interim, we have someone with no support. [¶] And, also, in a proceeding for dissolution of marriage or legal separation. In this case it's a dissolution. A party has to have an equal right to representation based upon the income and needs assessment of that party. So the fees for the cost of maintaining or defending that proceeding during the pendency of the proceeding is essential."

The court then expressly reserved jurisdiction on what was "being paid or proposed to be paid on the part of the respondent to the petitioner." Otherwise, "an inequitable result will occur." The court also reiterated that in awarding temporary support and interim fees and costs, it was not declaring the prenuptial agreement invalid, but rather recognizing the issue of validity had not yet been determined. Accordingly, even though the court expressed doubt that either party had "adequately represented the true incomes," based on the information before it, the court found Lily had no income "other than the rental income that is debatable," and awarded temporary support and interim fees and costs. The court filed its written order on October 31.

Appealability

As a preliminary matter, Lily claims Noel has appealed from a nonappealable, interim order and his appeal should therefore be dismissed.

However, " '[e]ven if it is technically interlocutory, an order dispositive of the rights of the parties in relation to a collateral matter, or directing payment of money or

performance of an act, may be subject to direct appeal. For this reason, it has long been established that several portions of a judgment may be separately appealed, particularly in dissolution cases.' [Citations.] Indeed, our Supreme Court has held that an order granting or denying temporary spousal support 'is directly appealable as a final judgment independently of the main action.' " (*In re Marriage of Campbell* (2006) 136 Cal.App.4th 502, 505–506, quoting *Greene v. Superior Court* (1961) 55 Cal.2d 403, 405.) While the substance of Noel's appeal differs from the more typical attack on temporary spousal support, namely the amount of such award, he has nevertheless appealed from an order granting temporary support (and, thus, ordering him to pay money), over which we have appellate jurisdiction under the collateral order doctrine.

There is, however, a significant procedural aspect to this case that arguably affects the "finality," and thus the appealability of, the trial court's order—the fact that the court expressly reserved jurisdiction to revisit the issue of temporary support and interim fees after trial on the enforceability of the premarital agreement. This reservation of jurisdiction was important to ensuring that the court could revisit temporary support and interim fees, and specifically whether Noel can recoup support and fees he has paid to Lily, should the court find the premarital agreement is enforceable. (See *In re Marriage of Spector* (2018) 24 Cal.App.5th 201, 208–210 [discussing the two pivotal cases addressing the court's power to make retroactive changes to temporary spousal support; "*Gruen*[5] and *Freitas*[6] together establish the rule that a trial court lacks jurisdiction to retroactively modify a temporary support order to any date earlier than the date on which a proper pleading seeking modification of such order is filed, *unless the trial court expressly reserves jurisdiction* to amend the support order such that the parties' clear expectation is the original support award is not final"], italics added.) In short, the record

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5 *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627.

6 *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059.

in this case is abundantly clear that the challenged order for support and interim fees is *not* the court's final ruling on these items.[7]

The collateral order doctrine, however, is not predicated on a "final" judgment or order in the traditional sense. Rather, it is a judicially made doctrine that allows for timely appellate review of orders that are *not* embraced within a final judgment, but which are immediately operative and sufficiently definitive to permit effective appellate review, particularly where the order requires action or the payment of money and where the issue presented may otherwise evade appellate review. (See *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 898–903 [discussing development of, and policies underlying, doctrine; recognizing split as to whether challenged order must require appellant to take action or pay money and concluding these are not requirements in all cases].) The issue Noel raises here, whether the trial court was legally *required* to first try the issue of the enforceability of the premarital agreement before making any order on support and fees, is such an issue—the order was immediately operative, it required him to pay money, it is sufficiently definitive to allow effective appellate review and, the issue could have become moot had trial on the marital agreement been more promptly scheduled.

While we have little doubt the collateral order doctrine allows an appeal under the particular circumstances before us, out of an abundance of caution we shall deem Noel's notice of appeal to be a petition for writ of mandate, over which we clearly have jurisdiction. (See *Gillis v. Dental Bd. of California* (2012) 206 Cal.App.4th 311, 318, overruled on different issue *Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1116, fn. 2.)

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[7] We express no opinion at this time as to the standard the trial court should apply in determining whether the 1999 premarital agreement, and specifically the waiver of spousal support, is enforceable. (Compare *In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 1069–1080 and *In re Marriage of Facter* (2013) 212 Cal.App.4th 967, 981–984.)

Temporary Spousal Support

Noel's appeal is grounded on the assertion the trial court was legally required to first try and rule on the validity of the parties' premarital agreement before entertaining, let alone granting, any request for temporary spousal support.

We generally review temporary spousal support orders only for abuse of discretion. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.) However, where there is a claim the trial court misapplied the law, our review is de novo. (See *Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333–1334.)

In support of his assertion that the court was legally required to try the validity of the parties' premarital agreement before considering any request for temporary support, Noel cites Family Code section 1615 and Texas Family Code section 4.006.[8] He maintains both statutes place the burden on Lily to show that the premarital agreement is unenforceable. While Noel acknowledges that Family Code section 3600 gives "trial courts general authority to issue temporary spousal support during divorce proceedings,"[9] he contends Family Code section 1615 is the "newer and more specific section" and thus "controls over the more general provision for temporary spousal support in section 3600." He additionally asserts *In re Marriage of Pendleton & Fireman* (2000) 24 Cal.4th

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[8] Both Family Code section 1615 and Texas Family Code section 4.006 address the enforceability of premarital agreements and state, in part, that a "premarital agreement is not enforceable if the party against whom enforcement is" sought proves that he or she did not voluntarily execute the agreement, or that the agreement was unconscionable. (Fam. Code, § 1615, subd. (a)(1); Tex. Fam. Code, § 4.006, subd. (a)(1).) While Family Code section 1615 was amended in 2002 to add several procedural requirements, these amendments do not apply retroactively to premarital agreements, like that at issue here, executed prior to the effective date of the amendments. (*In re Marriage of Howell, supra*, 195 Cal.App.4th at pp. 1069–1077.)

[9] Family Code section 3600 provides, in pertinent part, "During the pendency of any proceeding for dissolution of marriage or for legal separation of the parties . . . , the court may order (a) either spouse to pay any amount that is necessary for the support of the other spouse, consistent with the requirements of subdivisions (i) and (m) of Section 4320 and Section 4325. . . ."

39 (*Pendleton*) "provides further support for the rule that temporary support cannot be awarded contrary to the terms of a premarital agreement."

Noel's reliance on the statutory provisions governing who has the burden of proof in challenging a premarital agreement is misplaced. The issue at hand is not who has the burden of proof when the validity of the parties' premarital agreement *is tried* (see, e.g., *In re Marriage of Hill & Dittmer* (2011) 202 Cal.App.4th 1046, 1052–1053 [discussing showing required to invalidate premarital agreement]), but rather, whether the court had discretion, under the particular circumstances here, to order temporary support until it tried the validity of the agreement.

Noel's reliance on *Pendleton* is also misplaced. In that watershed case, the Supreme Court addressed "whether a premarital agreement in which the parties to be married waive the right to spousal support in case of dissolution is enforceable" and held, consistent with substantially changed public attitudes and policies, that such agreements are not "per se unenforceable." (*Pendleton, supra*, 24 Cal.4th at p. 41.) The parties in *Pendleton* had signed a premarital agreement waiving " 'any type of' " spousal and child support. (*Ibid.*) When the wife later petitioned for dissolution, she sought spousal support, including temporary support. (*Id.* at p. 42.) The husband moved to strike the request for support and to bifurcate the issue of the enforceability of the premarital agreement. The trial court denied the motion to bifurcate on grounds there would be no time savings and then ruled "the waiver of spousal support was against public policy and thus was unenforceable" and ordered the husband to pay temporary spousal support. (*Ibid.*)

The husband appealed the order for temporary support, and the Court of Appeal reversed, concluding the trial court had incorrectly assumed "such waivers were per se unenforceable" and thus had not determined whether the premarital agreement "was enforceable under the rules set forth in section 1615 and the policies underlying the Uniform Act and the California version thereof." (*Pendleton, supra*, 24 Cal.4th at p. 43.) On review, the Supreme Court agreed that "no public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated

persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver." (*Id.* at pp. 53–54.)

In claiming the reasoning of *Pendleton* necessarily prohibits an award of temporary support pending trial on the validity of a premarital agreement, Noel reads too much into the case. The issue before the high court was "whether a premarital agreement in which the parties to be married waive the right to spousal support in case of dissolution is enforceable." (*Pendleton, supra,* 24.Cal.4th at p. 41.) In answering that question, the court engaged in an extensive discussion of the development of the law and evolving public attitudes toward both dissolution and spousal support. (*Id.* at pp. 44–53.) It also paid particular attention to whether its prior opinions in *In re Marriage of Higgason* (1973) 10 Cal.3d 476,[10] and several other cases invalidating various premarital agreements, reflected current California law and were controlling. (*Pendleton,* at pp. 46–47; see *id* at pp. 54–55 (dis. opn. of Kennard, J.).) The court held they were not and that there is no per se prohibition against the enforcement of premarital agreements waiving spousal support. (*Id.* at pp. 53–54.)

Nonetheless, Noel maintains that *Pendleton* necessarily forecloses temporary support pending trial on the validity of a premarital agreement because, if it did not, the "[C]ourt of [A]ppeal could have simply cited *Spreckles* [*v. Spreckles* (1952) 111 Cal.App.2d 529 (*Spreckles*)] and affirmed on that basis."

In *Spreckles*, the parties entered into a postnuptial property settlement agreement when they first separated, whereby they waived the right to support or alimony. (*Spreckles, supra*, 111 Cal.App.2d at p. 530.) The parties then reconciled, but within several years again separated. At that juncture, the trial court ordered temporary alimony. (*Id.* at pp. 530–531.) The husband appealed, claiming the property agreement barred any alimony. (*Ibid*.) The Court of Appeal affirmed, explaining only a *valid* agreement would bar any form of alimony and because the agreement was in dispute, there was no

[10] Disapproved on other grounds as stated in *In re Marriage of Dawley* (1976) 17 Cal.3d 342, 352.

substantive bar to the order for temporary alimony. (*Id.* at pp. 532–533.) "[S]ince it is necessary to determine the validity and effect of the property settlement agreement in order to adjudicate the rights of the parties, the court properly deferred its ruling on these questions until the case be tried on the merits. The agreement, therefore, is not a bar to an award for temporary support, counsel fee and costs." (*Id.* at p. 533.)

Because the *Pendleton* courts, given the disputed validity of the premarital agreement at issue in that case, did not simply cite to *Spreckles* and affirm the order of temporary spousal support but, instead, reversed the order and remanded for trial on the validity of the premarital agreement, Noel maintains *Pendelton* implicitly rejects the *Spreckles* holding that a trial court can order temporary support pending trial on the validity of a disputed agreement. The difficulty Noel faces is that there was no issue in *Pendleton* as to the procedural order in which a trial court must hear a request for temporary spousal support and conduct a bifurcated trial on the enforceability of a premarital agreement that purports to waive support. Accordingly, neither the Court of Appeal nor the Supreme Court addressed the difficulties a trial court may face in managing its calendar and the discretion the court has in setting matters as soon as is practicable, particularly where, as here, the court has expressly retained jurisdiction and stated that should it uphold the premarital agreement and conclude the agreement bars any support, it will revisit the issue of temporary support and will not allow an "inequitable result."[11] (See *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 337 [wife can be required to account for and credit temporary alimony if marital agreement is determined to be valid and waives alimony].)

[11] Noel additionally cites Texas cases stating premarital agreements are presumptively enforceable and the burden is on the party challenging enforceability to prove otherwise. As we have explained, who has the burden of challenging a premarital agreement is an entirely different issue than whether a court has authority to order temporary support pending trial on the validity of such an agreement.

Attorney Fees

Noel makes similar assertions as to the award of interim attorney fees. He acknowledges Family Code section 2030 gives trial courts "general authority to order interim fees in family law matters,"[12] but maintains Family Code section 1615, governing who bears the burden of challenging a premarital agreement, controls because it is the "later, more specific statute." We have already addressed and rejected Noel's "controls over" assertion in connection with Family Code section 3600 and reject his assertion as to section 2030 for the same reasons.

He additionally contends execution of the premarital agreement "effectively took the case out of the normal provisions of the Family Code for issuance of temporary support and fees, and instead made those issues a contractual matter between the parties," citing to *In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132 (*Sherman*) and *In re Marriage of Guilardi* (2011) 200 Cal.App.4th 770. Neither case addresses the issue here—whether, under the particular circumstances here, the court could award interim fees and costs pending trial on the enforceability and meaning of the premarital agreement.

Sherman involved a settlement agreement approved by an interlocutory judgment of dissolution and later by a final judgment of dissolution. (*Sherman, supra*, 162 Cal.App.3d at p. 1136.) The agreement spelled out the husband's spousal support obligations upon dissolution as well as for attorney fees and costs should either party " 'be required to bring any action or proceeding to enforce any provision' " of the agreement. (*Id.* at pp. 1135–1136.) The agreement further stated the spousal support obligation terminated at the death of either party, but otherwise would continue and was

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[12] Family Code section 2030, subdivision (a)(1) provides, in pertinent part, "In a proceeding for dissolution of marriage . . . the court shall ensure that each party has access to legal representation, including access early in the proceedings, to preserve each party's rights by ordering, if necessary based on the income and needs and assessments, one party . . . to pay the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding."

not modifiable. (*Id.* at p. 1135.) The ex-husband appealed after his ex-wife remarried, claiming his spousal support obligation should be terminated by the remarriage and the award for attorney fees and costs "constituted an act in excess of the trial court's jurisdiction." (*Id.* at p. 1137.) As to the fee award, the Court of Appeal ruled the fees "constitute[d] 'an element of the costs of suit' [citation] such that the order granting them [was] one concerning a 'matter embraced in the action [which is] not affected by the . . . order' previously appealed from." (*Id.* at p. 1140, fn. omitted.) The court also rejected the ex-husband's assertion that the order should be reversed because he had not been allowed to present evidence of inability to pay, explaining that "the order emanated from the contractual relationship of the parties and not from their relationship under the Family Law Act." (*Ibid.*)

Guilardi also involved a settlement agreement incorporated into a final judgment of dissolution. The ex-wife later moved to set aside the judgment on grounds of fraud, mistake, duress, and statutory noncompliance. (*Guilardi, supra*, 200 Cal.App.4th at p. 772.) Although the court denied her motion, the ex-wife sought attorney fees under the Family Code. (*Id.* at p. 773.) Observing there was inconsistency on the "question of whether statutory counsel fees are available to the party unsuccessfully challenging an MSA," (*id.* at p. 774) the Court of Appeal held fees were properly denied because the "Wife's challenge to the validity of the agreement had already been found to be without merit," and that the language of the agreement encompassed claims made by either party against the other arising out of the agreement. (*Id.* at p. 775.)

Here, in contrast to *Sherman* and *Guilardi*, there has not yet been a determination that the premarital agreement is enforceable. Nor has it been incorporated into any judgment. Accordingly, it cannot yet "contractually" control the awarding of fees.

DISPOSITION

The temporary support and interim fee order is affirmed.[13] Respondent to recover costs on appeal.

[13] We reiterate that we have concluded the trial court did not err or abuse its discretion in ordering temporary support and interim fees pending trial on the enforceability of the premarital agreement in light of the specific record that is before us. We have no occasion to consider, and express no opinion as to, whether a trial court would err or abuse its discretion under different circumstances.

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Banke, J.

We concur:

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Humes, P.J.

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Sanchez, J.